Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 80-545

In the Supreme Court of the United States

OCTOBER TERM, 1980

DELORES C. LOWREY,

Appellant

versus

M. MORRIS,

Appellee

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the sale of real property for failure to pay past due taxes where the only notice given to a non-resident owner is by publication violates the Due Process Clause of the Constitution?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

DELORES C. LOWREY, Appellant

v.

M. MORRIS, Appellee

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

Delores Lowrey, the appellant, appeals from the final judgment of the Mississippi Supreme Court, dated June 4, 1980, affirming, without opinion, a lower court's conclusion that provisions of the Mississippi Code not granting the right of some notice (other than by publication) to non-residents prior to the sale of their land for failure to pay back taxes did not violate the Due Process Clause of the Fourteenth Amendment.

OPINIONS BELOW

The Mississippi Supreme Court affirmed, without opinion, the trial court's finding that a municipality is not consti-

tutionally compelled to give actual notice of an impending tax sale to a non-resident owner. The opinion of the trial court is found at Appendix A.

JURISDICTION

This case was initiated by appellee as a tax-confirmation proceeding. The judgment of the Supreme Court of Mississippi divesting appellant of her interest in the land in question was entered on June 4, 1980. (Appendix B) Notice of Appeal was filed with that court on August 25, 1980. (Appendix C) This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (2). *Paschall v. Christie-Stewart, Inc.* 414 U.S. 100 (1973).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

[N]or shall any State deprive any person of . . . property without due process of law

STATEMENT OF THE CASE

Prior to October 1, 1975, there was no statutory requirement that municipalities in Mississippi notify non-resident owners of land of the expiration of a two-year redemption period 1 which follows the sale of property for non-

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1. See MISS. CODE ANN. §§ 21-33-61; 27-45-11 (1972) (two year-period for redemption).

payment of taxes.2 Noting that Mississippi was among twenty-one jurisdictions not requiring notice, a recent article concluded:

> [I]t is possible [in these states] to complete the entire tax sale procedure with no notice to interested parties other than by publication (or posting at the courthouse, or both). 3 Such a practice raises the distinct possibility that the owner will lose his property without ever having known what was happening. [Comment, *The Constitutionality of Notice by Publication in Tax Sale Proceedings*, 84 YALE L.J. 1505, 1506 (1975).]

This is exactly what occurred in the instant case.

In 1972 Edward Lowrey and his wife, Delores Lowrey, resided in New Orleans. At that time they became interested in property located in Gulfport, Mississippi (approximately seventy miles away) which they felt was appropriate for the construction of a second home. In May of 1972 the property was purchased in Mrs. Lowrey's name for $6,000 from Mr. Ben Pritchard.

In October of 1973 Mr. Lowrey's employer, General Electric, transferred him to Maitland, Florida. Some two years later, the Lowreys agreed to sell the Gulfport property to Jack Moline.

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2 On October 1 the law was amended to require city clerks to ascertain the ownership of land and, with respect to non-residents, give notice by registered or certified mail at least sixty days prior to the expiration of the redemption period. MISS. CODE ANN. § 27-43-3 (Supp. 1979). See also MISS. CODE ANN. § 27-43-1 (Supp. 1979) (sixty-day period; form of notice).

3 See MISS. CODE ANN. § 27-41-55 (1972) (publication for three weeks in local newspaper and posting at courthouse of fact that taxes are delinquent.

It was at this point that they learned, for the first time, that the following series of events had occurred. On September 17, 1973, the land was sold to Charles C. Hairston for $89.50 as a result of non-payment of city ad valorem taxes on the property for the year 1972. The period for redemption of the property expired on September 17, 1975, and on October 17 of that year, a tax deed conveying the property to Hairston was executed by the City Clerk. Three days later, Hairston conveyed the property to the appellee. The *only notice* given of these proceedings was by publication in the local newspaper and the sending of notice of the expiration of the redemption period by certified mail to the previous owner, Ben Pritchard.

Subsequently, appellee brought suit for confirmation of tax title and secured a final decree with respect to the issue on March 29, 1976. On March 25, 1977, Mrs. Lowrey filed her petition for rehearing,4 alleging, among other things, that the sale of the property without giving her adequate notice violated the Due Process Clause of the Constitution. R.20.

Although a significant portion of the evidence presented by the Lowreys was deemed irrelevant, the following facts are clear. First, for the years 1972-1975 Mrs. Lowrey received notice of

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4 This procedure is authorized by MISS. CODE ANN. § 11-5-89 (1972). In the interim, appellee sold the property to a third party who had no notice of appellant's adverse claim. Pursuant to a determination that this was a good-faith purchase, appellant filed an amendment seeking restitution from appellee in the amount of $10,000.00.

taxes due the *county* and these taxes were immediately paid upon receipt of the notices. Second, the city clerk (who also serves as city tax collector) utilized the county rolls to ascertain the names of property owners subject to city taxes. Third, in 1973 the Lowreys made a special trip to Gulfport seeking information with respect to tax liability on their property. Fourth, neither this trip nor any other independent source of information gave them actual notice that both the city and county governments subjected the property to taxation. Fifth, throughout the period in question they erroneously assumed that the tax laws of Mississippi operated in the same manner as those of Louisiana and Florida, *i.e.*, that one lump sum assessment was made each year for all (including city and county) ad valorem taxes due on property. Finally, it remained undisputed that she received no actual notice with respect to taxes owed, the sale to Hairston, or the fact that the period for redemption was to expire on September 17, 1975.

Rejecting all arguments raised by appellant (including violations of the Due Process Clause) the trial court found:

> [T]he failure of [appellant] . . . to pay taxes for the year 1972 due the city of Gulfport, Mississippi, on said property, or to redeem the tax sale before the redemption period ended, was due to her own negligence and was not in any way the fault of the City of Gulfport. . .
>
> . . . .
>
> . . . [T]he only defense offered by Lowrey [is] the failure of the City of Gulfport to mail her notice of the taxes due or of the expiration of the redemption period; *and this Court*

> *find[s] as a matter of law there was no such duty owed by the city of Gulfport to so notify Lowrey* . . . . (Emphasis added.)

The appeal to the Mississippi Supreme Court followed with appellant assigning as error the trial court's refusal to find that the failure of the City to give notice violated rights granted by the Due Process Clause.

THE QUESTION IS SUBSTANTIAL

The law of Mississippi is clear: failure to give actual notice to owners or other interested parties of the impending expiration of the two-year redemption period does not void a tax sale. E.G., *DeMoe v. McLeod,* 87 So.2d 906, 908 (Miss. 1956); *Santa Cruz v. State,* 78 So.2d 900,901 (Miss. 1955). Indeed, as recently as August of 1979 the lower court held that the October, 1975 legislation requiring that actual notice be given was not to be given retroactivity and that the failure to give notice was justified "for the reason that there was no statute [prior to October, 1975] requiring such notice in municipal tax sales . . . ." *Associates Capital Corp v. Alexander,* 374 So.2d 218, 221 (Miss 1979).

The approach used by the Mississippi Supreme Court incorporates the concept that such proceedings are in rem, *i.e.,* a proceeding directly against the property rather than against the owner of the property. The justification for not requiring notice is found in precedent of this Court espousing what is known as the "caretaker theory." Pursuant thereto, owners of property are held to a duty to keep themselves informed of any proceeding affecting it. *North Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283

(1925); *Longyear v. Toolan,* 209 U.S. 414, 418 (1908). Thus, the general rule has been that notice by publication is constitutionally adequate in all proceedings in rem, and tax sales are considered to fall within that category. *Ballard v. Hunter,* 204 U.S. 241, 258 (1907); *Leigh v. Green,* 193 U.S. 79, 90 (1904).

The critical issue upon which this case focuses, however, remains unanswered. Has the rule that notice by publication is sufficient survived *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950)? Specifically, in the face of *Mullane's* holding that classification of proceedings as in rem or in personam is irrelevant in determining the constitutional sufficiency of notice given, must the sale of real property for failure to pay back taxes be proceeded by notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. . . ."? *Id.* at 314.

In 1973, this Court noted probable jurisdiction on precisely this issue, only to remand the case for a determination of whether there existed an independent state ground. *Paschall v. Christie-Stewart, Inc.,* 414 U.S. 100 (1973). 5 At this time, the lower

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5. In Botens v. Aronauer, 414 U.S. 1059 (1973), an appeal involving the issue was dismissed for want of a substantial federal question. The record in that case, however, reflects the fact that although the statutes in question only required published notice, the appellant received mailed notice prior to expiration of the period of redemption. See Appellees' Response to Jurisdictional Statement and Motion to Affirm at 1-2; Motion to Dismiss or Affirm by the Attorney General of the State of New York at 3,6, & n.*, Botens v. Aronauer, 414 U.S. 1059 (1973).

courts remain split on the issue. The state courts of Oklahoma, 6 Oregon, 7 New York 8 and Mississippi continue to adhere to the caretaker theory while the courts of Kansas, 9 Arizona, 10 New Jersey, 11 Michigan, 12 and a federal district court in Oregon, 13

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6 Christie-Stewart, Inc. v. Paschall, 502 P.2d 1265 (Okla. 1972), *vacated and remanded,* 414 U.S. 100 (1973).

7 Umatilla County v. Porter, 12 Ore. App. 393, 507 P.2d 406 (1973).

8 Botens v. Aronauer, 32 N.Y.2d 243, 298 N.E.2d 73, 344 N.Y.S.2d 892, *appeal dismissed,* 414 U.S. 1059 (1973).

9 Board of Sedgwick County Commr's v. Fugate, 210 Kan. 185, 499 P.2d 1101 (1972) (per curiam).

10 Brandt v. City of Yuma, 124 Ariz. 29, 601 P.2d 1065 (1979); Johnson v. Mock, 19 Ariz. App. 283, 506 P.2d 1068 (1973).

11 Township of Montville v. Block 69, Lot 10, 376 A.2d 909 (N.J. 1977) (The issue split this court 4-3)

12 Dow v. State, 240 N.W.2d 450 (Mich. 1976).

13 Scoggin v. Schrunk, 344 F. Supp. 463 (D. Ore. 1971).

have applied *Mullane* to tax sales and have held notice by publication unconstitutional. 14 Since *Mullane*, of course, this Court has continued to press home the point that when important interests are at stake, publication in not an adequate substitute for mail notification 15.

14.The federal court in Oregon went farther. Concluding that "[t]here is a correlation between the notice a taxpayer is entitled to receive and the extent of the loss he might suffer by lack of adequate notice," the court held that notice by mail on two separate occasions prior to the tax sale, in addition to published notice, was unconstitutional where the owner stood to lose property worth in excess of $10,000 to satisfy a tax lien of $209. 344 F. Supp. at 470.

15 See, e.g., Robinson v. Hanrahan, 409 U.S. 38 (1972) (notice by certified mail to automobile owner's home violated due process in forfeiture proceedings where the state knew that the owner was being held in county jail); Schroeder v. New York, 371 U.S. 208 (1962) (posting near premises and publication insufficient notice in condemnation proceeding); *Walker v. Hutchinson,* 352 U.S. 112 (1956) (newspaper publication alone violates due process in condemnation proceedings); New York v. New York, N.H. & H.R. Co., 344 U.S. 292 (1953) (publication insufficient notice under bankruptcy reorganization).

CONCLUSION

Reviewing the arguments for and against exempting tax sales from the *Mullane* rule the author of the *Yale Law Journal* article concludes that "in an appropriate case, the Supreme Court should declare that notice solely by publication. . . is unconstitutional." 84 YALE L.J. at 1518. This is that case. Probable jurisdiction should be noted.

Respectfully submitted,

Thomas A. Pritchard
232 Porter Avenue
Biloxi, Mississippi

George Colvin Cochran
University, Mississippi
(601) 232-7361

CERTIFICATE OF SERVICE

I, Thomas A. Pritchard, attorney of record for Delores C. Lowrey in the above styled and numbered cause, do hereby certify that I have this day mailed via the United States mail, p postage prepaid, three true and correct copies of the above and foregoing Jurisdictional Statement to the Honorable Charles Reid, attorney for Appellee, to his usual and customary address at P.O. Box 1244, Hattiesburg, Mississippi 39401.

I further certify that all parties required to be served pursuant to Rule 28 of the United States Supreme Court have been served.

SO CERTIFIED, this the 3rd day of September, 1980.

THOMAS A. PRITCHARD

APPENDIX A
A-1

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT
OF HARRISON COUNTY, MISSISSIPPI

M. MORRIS — COMPLAINANT

VERSUS — CAUSE NO. 67,948

DELORES C. LOWREY, ET AL — DEFENDANTS

FINAL DECREE

This cause coming on to be heard on the Bill of Complaint, Petition for Rehearing, Amended Answer and Cross-Bill and the Replication to Affirmative Defenses and Answer to Cross-Bill and upon both oral and documentary evidence, the prior stipulations of counsel; and the Court having heard all of the same together with the arguments of counsel and being now fully advised in the premises, is of the opinion and finds that all proper and necessary parties are properly before this Court and that this Court has jurisdiction of the subject matter and the parties to this cause of action, as the Complainant, M.Morris, and the Defendant and Cross-Complainant, Delores C. Lowrey, appeared in Court and were represented by counsel, and that any and all unknown persons were summoned by publication in the manner and within the time prescribed by law, but made no appearance, and it further appearing to the satisfaction of the Court and the Court doth find further as follows, to-wit:

(1) That the said property passed from the sovereign to private ownership and therefore became taxable as privately owned land; taxes for the year 1972 were lawfully assessed and levied by the City of

Gulfport.

(2) That the Defendant and Cross-Complainant did not pay the ad valorem taxes owing the City of Gulfport, Mississippi for the year 1972,on said property, nor did anyone else.

(3) That the City Tax Collector of Gulfport, Mississippi sold said property on September 17,1973, for the taxes owing said city for the year 1972 to Charles C. Hairston in the manner required by law after proper notice; that the period of redemption of said tax sale expired on September 17, 1975, without said property being redeemed; that certified copies of the tax deed and the list of land sold for taxes by the City of Gulfport, Mississippi were annexed and made a part of the Bill of Complaint; that the City of Gulfport acting through its Tax Collector and City Clerk executed a tax deed to Charles C. Hairston, dated October 17, 1975, appearing of record in Land Deed Book 767, at page 179 conveying said property; that Charles C. Hairston conveyed said property to M. Morris by quit claim deed dated October 20, 1975, and appearing of record in Land Deed Book 760, at page 575, all of said records being on file in the office of the Chancery Clerk of the First Judicial District of Harrison County, Mississippi.

(4) That said property was assessed in the name of Ben F. Prichard by the Tax Collector of the City of Gulfport for the year 1972; that he was the record owner of said property on the date of assessment, January 1, 1972.

(5) That on July 18, 1975, the City of Gulfport issued a

notice to Ben F. Prichard at 1415 Mills Street, Hansboro Station, Gulfport, Mississippi 39501 by certified mail being receipt number 737763; that on July 22, 1975, the notice was received by Ben F. Prichard; that the return receipt card was returned to the office of the Tax Collector of the City of Gulfport showing receipt of the notice.

(6) That the failure of the Defendant and Cross-Complainant, Delores D. Lowrey, to pay the taxes for the year 1972 due the City of Gulfport, Mississippi, on said property, or to redeem the tax sale before the redemption period ended, was due to her own negligence and was not in any way the fault of the City of Gulfport, Mississippi, or any of the employees in its tax collection department; that from her own testimony and from the testimony of her husband, she made no attempt to pay the taxes due prior to said tax sale, nor did she make any attempt before the redemption period expired on September 17, 1975 to redeem said tax sale, as she assumed that all ad valorem taxes were paid to the County taxing authority; that no employee of the City of Gulfport or of Harrison County misinformed her as to the payment of taxes; that she made no attempt to list her property with the City of Gulfport for taxation and that she failed to give the City of Gulfport her address; and that no one attempted to pay the taxes or redeem the tax sale on her behalf.

(7) That the Bill of Complaint was filed on February 17, 1976 by M. Morris; that the Defendant, Delores C. Lowrey, and all unknown persons were served with process by publication in the manner and within the time prescribed by law; that a Decree Pro

Confesso and a Final Decree was rendered against said Defendants on March 29, 1976; that a Petition for Rehearing was filed by John C. Hoffman as Attorney for Delores C. Lowrey on March 25, 1977; that an Answer was also filed by John C. Hoffman, as attorney for Delores C. Lowrey on that date; that an Answer to the Petition for Rehearing and a Suggestion of Non-Joinder were filed by the Complainant in response to the Petition for Rehearing; that Carl Leggett Builders, Inc. was made a party and it filed a Plea in Bar; that a certain Stipulation of Fact was entered into by the attorney for Carl Legget Builders, Inc. and the attorney for Delores C. Lowrey that Carl Leggett Builders was a good faith purchaser for the sum of $4, 500.00 of the hereinafter described property on July 19, 1976 in reliance upon the Final Decree dated March 29, 1976 and without notice of any defenses or claims of Delores C. Lowrey; that this Court entered an order thereafter on July ____,1978, removing the property in question from the suit and Carl Leggett Builders, Inc. was dismissed, pursuant to Section 11-5-91 of the Mississippi Code of 1972; that the Defendant, Delores C. Lowrey, through her attorney, Tom Pritchard, filed a Motion For Leave to File Amended Answer and an Amended Answer; that the Complainant and Cross-Defendant, M.Morris, filed a Replication to Affirmative Defenses and Answer to Cross-Bill.

(8) That upon the conclusion of the evidence presented by the Cross-Complainant, Delores C. Lowrey at the trial, the Cross-Defendant, M. Morris moved the Court to exclude all of the evidence presented by Lowrey and for dismissal of her Cross-Bill,

as Lowrey failed to overcome the prima facie presumption of a valid tax sale and tax title created by the exhibited tax deed with the only defense offered by Lowrey being the failure of the City of Gulfport to mail her a notice of the taxes due or of the expiration of the redemption period; and this Court finding as a matter of law that there was no such duty owed by the City of Gulfport to so notify Lowrey and that said Motion to exclude the evidence offered by Lowrey was well taken.

(9) That the Complainant and Cross-Defendant, M. Morris is entitled to the relief prayed for in his Bill of Complaint and Replication to Affirmative Defenses and Answer to Cross-Bill; and that the Defendant and Cross-Complainant, Delores C. Lowrey, is not entitled to any of the relief prayed for in her original Answer or her Amended Answer and Cross-Bill.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion to exclude the evidence of the Defendant and Cross-Complainant, Delores C. Lowrey, be and the same is hereby sustained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Cross-Bill of Delores C. Lowrey be, and the same is hereby dismissed on its merits with full prejudice as against M. Morris and Delores C. Lowrey's prayer for relief contained therein is denied in toto and the Complainant and Cross-Defendant, M. Morris's prayer for relief contained in his Bill of Complaint and Replication to Affirmative Defenses and Answer to Cross-Bill is hereby affirmed in all respects.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the title of M. MORRIS, which was conveyed to

CARL LEGGETT BUILDERS, INC. is hereby confirmed to the following described real property located in the First Judicial District of Harrison County, Mississippi, to-wit:

> Lot 12 of the Bayou Villa Subdivision of the Subdivision of the City of Gulfport, located in Section 25, Township 7, Range 11, as per plat or map on file in the office of the Chancery Clerk of the First Judicial District of Harrison County, Mississippi.

and the said Carl Leggett Builders, Inc. is hereby declared to be the true, legal and equitable owner of said land by virtue of said tax sale, tax deed and subsequent quit claim deed, and warranty deed from M. Morris and its title is confirmed and quieted against all of the Cross-Defendants, namely: Delores C. Lowrey, and any and all unknown persons having or claiming any legal or equitable interest in or to the hereinabove described real property, and the Cross-Defendants and all other persons are stopped from questioning the validity of said tax sale of the hereinabove described real property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Cross-Complainant, Delores C. Lowrey, have and recover nothing from theComplainant and Cross-Defendant, M. Morris, for restitution under Section 11-5-91 of the Mississippi Code of 1972 for the loss of her property, as that loss was due to her own negligence in failing to pay the taxes due to the City of Gulfport for the year 1972 and in failing to redeem the tax sale before the redemption period expired on September 17, 1975.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Decree be recorded and indexed in the Land

Deed Records in the office of the Chancery Clerk of the First Judicial District of Harrison County, Mississippi.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Cross-Defendants pay or cause to be paid to the Clerk of this Court all costs and disbursements arising out of this action.

SO ORDERED, ADJUDGED AND DECREED this the 30th day of March, A.D., 1979.

/S/ John S. Morris
CHANCELLOR

APPENDIX B

A-8

MANDATE FROM THE SUPREME COURT OF MISSISSIPPI

TO THE Chancery Court of Harrison County - Greetings: WHEREAS, on the 4th day of June, 1980, the same being a day of the regular term of the Mississippi Supreme court, begun and held in the Courtroom, in the Gartin Building, in the City of Jackson, Mississippi, on the 1st Monday of March in the year of our Lord 1980, the following final decree was rendered by the Mississippi Supreme Court, to-wit:

DELORES C. LOWREY
No. 51,815 vs.
M. MORRIS

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Harrison County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order, adjudge and decree that the Decree of said Chancery Court rendered in this couse on the 30th day of March, 1979 - be and the same is hereby affirmed, It is further ordered, adjudged and decreed that the appellant do pay all of the costs of this appeal to be taxed for which let proper process issue.

APPENDIX C

A-9

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DELORES C. LOWREY — APPELLANT

VS. — NO. 51815

M. MORRIS — APPELLEE

TO:

HON. CHARLES REID
ATTORNEY AT LAW
P. O. BOX 1244
HATTIESBURG, MS. 39401

NOTICE OF APPEAL

Please take notice that Delores C. Lowrey, Appellant in the above styled and numbered cause, hereby prosecutes this her appeal form the ruling of the Supreme Court of the State of Mississippi, as entered on the 4th day of June, 1980, as made and provided by Rule 10.2 of the rules of the Supreme Court of the United States, and as further provided by 28 USC sec. 1257(2).

RESPECTFULLY SUBMITTED

DELORES C. LOWREY

BY: /S/ THOMAS A. PRITCHARD
THOMAS A. PRITCHARD
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Thomas A. Pritchard, attorney of record for Delores C. Lowrey in the above styled and numbered cause, do hereby certify that I have this day mailed via the United Stated mail, postage prepaid, a true and correct copy of the above and foregoing Notice of Appeal to the Honorable Charles Reed, attorney for Appellee, to his usual and customary post office address at P.O. Box 1244, Hattiesberg, Mississippi 39401.

I further certify that all parties required to be served pursuant to Rule 28 of the United States Supreme Court have been served.

SO CERTIFIED, this the 25th day of August, 1980.

/S/ THOMAS PRITCHARD

THOMAS PRITCHARD

NO. 80-545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DELORES C. LOWREY,

Appellant

VERSUS

M. MORRIS,

Appellee

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

CHARLES H. REID
P.O. Box 1244
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(601) 545 - 3113

ATTORNEY FOR APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-545

DELORES C. LOWERY,

Appellant

VERSUS

M. MORRIS,

Appellee

MOTION TO DISMISS OR AFFIRM

M. Morris, Appellee, moves the Court to dismiss the appeal filed herein, or in the alternative, to affirm the final judgment of the Mississippi Supreme Court, dated June 4, 1980, on the ground that it is manifest that the question on which the decision of this case depends is so insubstantial as to need no further argument.

I.

STATUTES INVOLVED

This appeal questions the validity of portions of Section 21-33-61 and 27-45-11 *Miss. Code Ann. of 1972,* which it is undisputed, then required no statutory notice from municipalities to the owners of land sold for taxes of the expiration of a two year redemption period.

This appeal also questions the validity of Section 27-41-55 *Miss. Code Ann. of 1972,* which it is undisputed required "publication in a newspaper published in the county for at least three weeks that the taxes on property are due and the arrears have not been paid with a description of the land."

II.

NATURE OF THE CASE

In February of 1975, the Appellee herein filed a Complaint to confirm his title to a lot in Gulfport, Mississippi. The Appellee's title was based on a tax sale for delinquent annual municipal taxes for the year of 1972, which attached as a lien on the property on January 1, 1972. Prior to the sale, notice was published in the manner required by law. The two year period of redemption expired without the property being redeemed. Prior to the expiration of the redemption period, notice by registered mail was mailed to Ben Pritchard, the person assessed with taxes for the year 1972 and the legal and record owner of said property at the time that the lien attached. It is also undisputed that Ben Pritchard received the notice that the redemption period was about to expire. It is also undisputed that the Appellant, or anyone acting in her behalf, did not notify the City of Gulfport, Mississippi, of her interest in the property or her address; nor did she, or anyone acting for her, make any attempt to ascertain the taxes due to

the City of Gulfport, Mississippi, or attempt to pay the taxes to the City of Gulfport, Mississippi.

Service of process was had on the Appellant by publication for three successive weeks and by registered mail to Appellant's current address. After a default judgment was rendered in March 1976, the Appellee conveyed the property to a bona fide innocent purchaser for value. The Appellant filed a Petition for Rehearing in March of 1977 to set aside the tax deed. After the property was removed from the suit because of its purchase by an innocent party, the Appellant amended her Petition for Rehearing praying for restitution. Upon the conclusion of Appellant's testimony, the trial court sustained a motion for a directed verdict and dismissed Appellant's Petition for Rehearing. Upon Appeal to the Mississippi Supreme Court, the trial court's judgment was affirmed without opinion. No petition for rehearing was submitted to the full panel of the Mississippi Supreme Court.

Appellant then appealed to the Supreme Court of the United States pursuant to 28 U.S.C. §1257(2) maintaining that she had been deprived of her property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

III.

ARGUMENT

Appellee contends that the question on appeal (i.e. the constitutionality of Sections 27-33-61, 27-45-11 and 27-41-55 of the *Miss. Code Ann. of 1972)* is so wanting in substance as to require no further argument to the Court.

The major focus of Appellant's argument is that based upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court should completely abandon the distinction between actions in personam and actions in rem and should

reject the "caretaker theory" and should require more notice to the owner than was required or received in the case at bar.

However, the Appellant's argument has been continously rejected by this Court.

Even in ***Mullane v. Central Hanover Bank & Trust Co.***, this Court held that constructive notice by publication was sufficient to satisfy due process requirements where the interest or addresses of the trust beneficiaries are unknown to the trustee. Where the names and post office addresses of the trust beneficiaries were known to the trustee, it was also held that notice by mail was sufficient to satisfy due process requirements.

This Court has had several opportunities to apply this theory to tax sales. However, the Court in both ***Paschall v. Christie-Stewart, Inc.***, 414 U.S. 100 (1973) and ***Botens v. Aronauer***, 414 U.S. 1059 (1973) declined to do so. In ***Christie-Stewart, Inc. v. Paschall***, 502 P. 2d 1265 (Olka. 1972) the Supreme Court of Oklahoma held that every person who owned an interest to land in Oklahoma is charged with knowledge that land is subject to an ad valorem tax and that land may be sold in the manner provided by law without any requirement that the owner receive notice of the tax sale. The Court also held that the tax collector was under no duty to search the County Clerk's records to ascertain the owners of land. In ***Botens v. Aronauer***, 298 N. E. 2d 73 (New York 1973) the Court of Appeals of New York held that personal or direct notice of impending tax sale or of notice of redemption need not be given to the owner and indirect notice is sufficient for all parties interested in property which is in default in payment of taxes and foliowed the holding of ***North Laramie Land Co. v. Hoffman***, 268 U.S. 276 (1925) that "such statutes are universally in force and are generally in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it."

The New York case also distinguished tax sale cases from *Mullane v. Central Hanover Trust Co.* 339 U.S. 306(1959) and *Schroeder v. City of New York*, 371 U.S. 208 (1962) where indirect notice by either publication or posting was held invalid for the reason that the individuals had no reason to expect that their property interests were being affected and such is not the situation in tax sale cases.

In the case at bar, Ben Pritchard was the record owner of the land in question when the lien attached and he was the person assessed with the taxes. The Appellant in her deed assumed the obligation of paying the taxes. Ben Pritchard actually received a written notice from the City of Gulfport, Mississippi, that the property had been sold for taxes and that the redemption period was about to expire. The Appellant apparently contends that the City of Gulfport, Mississippi, had an affirmative duty of ascertaining whether the name and address listed on its tax roles was correct. However, in *Mullane v. Central Hanover Bank & Trust Co.*, "the Court recognized that administrative limitations might hamper notification efforts, and stated that "impractical and extended searches are not required in the name of due process." 339 U.S. 306, 317-18. Also, the Appellant apparently relies upon the notion that the validity of the notice of the tax sale and expiration of the redemption period must be judged by the notice prescribed by the statute, and not by that which may have actually been given. *Wuchter v. Pizutti*, 276 U.S. 13(1928). However, this position seems to have been abandoned by the Court in *Botens v. Aronauer*, 414 U.S. 1059 (1973) dismissing appeal from 298 N.E. 2d 73(1973). Although the case involved a challenge to a statute which prescribed only published notice, it was dismissed for want of a substantial federal question because, as here, notice by mail was actually sent. *City of Atlantic City v. Block C-11, Lot 11*, 376 A. 2d 928 (1977). That case and the present case are distinguishable from *Township of Montville v. Block 69, Lot 10*, 376 A. 2d 909 (1977) because notice by mail was actually sent to the person assessed with

the taxes.

It should also be pointed out that the present case as well as the case cited by Appellant, *Umatilla County v. Porter*, 507 P. 2d 406 (Ore. 1973) are distinguishable from *Scoggin v. Schrunk*, 344 F. Supp. 463 (D. Ore. 1972) in that the assessment was an annual assessment which the taxpayer should have expected and was not a special assessment. Several reasons were given in that case for treating due process requirements different in tax sale cases than ordinary cases:

(1) the nature of taxation,
(2) The fact that tax obligations are imposed under public statutes with which the property owner is presumably familiar,
(3) the regular recurrent assessment of taxes, and
(4) the property owner's duty to the taxing unit, the demands of due process yield less for the property owner in tax foreclosure suits than in cases involving private obligations.

Also see *Knapp v. Josephine County*, 235 P. 2d 564 (Ore. 1951).

At the time of the tax sale and throughout the redemption period there was no statutory requirement imposing a duty on municipalities to give owners or any other person notice of the expiration of the redemption period. There is such a requirement now, namely Section 27-43-4, *Miss. Code Ann. of 1972*, as Amended, and effective October 1, 1975.

In a recent case *Associates Capital Corp. v. Alexander*, 374 So. 2d 218 (Miss. 1979) the Mississippi Supreme Court held:

> "We are of the opinion that failure to notice the Hayes and failure to notice the lienholders did not render

> the tax title of Saucier and Sakalarios void for the reason that there was no statute requiring such notice in municipal tax sales, that the chancellor correctly dismissed the Bill of Complaint and confirmed the title of Sakalarios and that judgment should be affirmed in that respect." (374 So. 2d at 221)

The law of Mississippi is also quite clear that the validity of a tax sale must be determined by the law in force at the time the sale was made. See ***Everett v. Williamson***, 143 So. 690 (Miss. 1932) and ***Reid v. Federal Land Bank of New Orleans***, 148 So. 392 (Miss. 1933). Any change in the statutory requirements of notice prior to the expiration of the redemption period has no effect once the tax sale has been made. See ***Price v. Harley***, 142 Miss. 584, 107 So. 673 (1926). The United States Supreme Court followed the case of ***Price v. Harley*** in the case of ***Wood v. Lovett***, 313 U.S. 362, 61 S. Ct. 983, 85 L. Ed. 1404 (1941) and said:

> "The federal and state courts have held, with practical unanimity, that any substantial alteration by subsequent legislation of the rights of a purchaser at a tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract."

Article 4, §79 of the ***Mississippi Constitution*** provides only that the right of redemption shall be preserved for at least two years, to-wit:

> "The legislature shall provide by law for the sale of all deliquent tax lands. The courts shall apply the same liberal principles in favor of such titles as in sale by execution. The right of redemption from all sales of real estate, for the nonpayment of taxes or special assessments, of any and every character whatsoever, shall exist, on conditions to be prescribed by law,

in favor of owners and persons interested in such real estate, for a period of not less than two years."

The assessment, levy and sale of said property by the City of Gulfport for the year 1972 did not constitute a taking of Appellant's property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Ample provision was provided for by the laws of Mississippi for the Appellant to object to the assessment of said property for taxation. Section 21-33-29 of the ***Miss. Code Ann. of 1972,*** provides that when the tax rolls have been equalized, the governing authorities shall give ten (10) days by publication in a legal newspaper in the municipality of notice of the regular or special meeting at which objections to such assessments will be heard. Section 21-33-33 of the ***Miss. Code Ann. of 1972,*** provides that each municipality shall hold a meeting on the date specified in the notice required by Section 21-33-29, to hear objections to the real and personal tax rolls and the assessments contained therein. Also provision is made under Section 21-33-47 of the ***Miss. Code Ann. of 1972*** that a notice of the tax levy shall be published within ten (10) days after its adoption in a newspaper published in the municipality. Section 21-33-63 of the ***Miss. Code Ann. of 1972***, provides that the sale of real estate for ad valorem shall be made upon the same notice, at the same time, and in the same manner as provided for by law for sales of like property for unpaid state and county taxes. Section 27-41-55 of the ***Miss. Code Ann. of 1972***, and which is made applicable by Section 21-33-63 to municipal tax sales provides for publication in a newspaper published in the county for at least three weeks that the taxes on property are due and the arrears have not been paid with a description of the land.

It is clear that the Appellant was not deprived of fundamental due process. Ample provisions were made under the laws of Mississippi from the date of assessment, January 1,

1972, throughout the two year redemption period which expired on September 17, 1975; that reasonable notice was given to the Appellant that taxes were due on said property and that said property would be sold to satisfy the tax lien.

Objection cannot be made under due process that these notices were by publication and not personal.

> "That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and at the time at which various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers due process of law." ***Winona & St. Peter Land Co. v. Minnesota,*** 159 U.S. 247 at 251, 16 S. Ct. 83, 40 L. Ed. 247 (1895).

In the present case, the Appellant had the right to appear before the City of Gulfport and object to her assessment when the tax rolls for the City of Gulfport were being equalized under Sections 21-33-29 and 21-33-31 of the ***Mississippi Code of 1972***.

The United States Supreme Court held in ***Hodge v. Muscantine County,*** 196 U.S. 276, 25 S. Ct. 237, 49 L. Ed. 477 (1905) that if a taxpayer be given an opportunity to test the validity of a tax at any time before it is made final whether the proceedings for a review take place before a board having a quasi-judicial character, or before a tribunal provided by statute for the purpose of determining such question, due process of law is not denied.

The United States Supreme Court held in ***Longyear v. Toolan***, 209 U.S. 414, 28 S. Ct. 506, 52 L. Ed. 8591 (1908), that the notice by publication of the pendency of proceedings to sell land to satisfy a lien for unpaid taxes satisfies the require-

ments of due process of law under the Fourteenth Amendment to the United States Constitution, where the delinquent taxpayer, who had an opportunity to be heard upon the assessment, cannot fail, if he exercises due diligence, to learn of the pendency of the proceedings, and that full opportunity to defend is afforded to him.

The question presented on appeal is so insubstantial that no written opinion was given by the Mississippi Supreme Court, and the Appellant failed to file a Petition for rehearing before the full panel of the Mississippi Supreme Court.

IV.

CONCLUSION

Wherefore, Appellee respectfully submits that Appellant's property was not taken without due process of law under the Fourteenth Amendment to the United States Constitution and that the questions upon which this cause depends are so insubstantial as not to need further argument and Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Mississippi Supreme Court.

Respectfully Submitted,

Charles H. Reid per m.a.s.

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CERTIFICATE OF SERVICE

I, Charles H. Reid, attorney for Appellee, M. Morris, in the above styled and numbered cause, do hereby certify that I have this day mailed via the United States mail, postage prepaid, three true and correct copies of the above and foregoing Motion to Dismiss or Affirm to the Attorneys for Appellant: Honorable George Calvin Cochran, University, Mississippi and Thomas A. Pritchard, 232 Porter Ave., Biloxi, Mississippi, their usual and customary addresses.

I further certify that all parties required to be served pursuant to Rule 28 of the United States Supreme Court have been served.

SO CERTIFIED, this the 16th day of February, 1981.

Charles H. Reid pro se.

CHARLES H. REID